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In The
Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., et al.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF IOWA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Do regulations issued by the Office of the Comptroller of the Currency qualify for *Chevron* deference even though those regulations preempt the states' authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks?

2. Do regulations issued by the Office of the Comptroller of the Currency infringe upon the states' sovereign powers protected by the Tenth Amendment to the United States Constitution by vesting that agency with exclusive authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks?

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INTEREST OF *AMICI CURIAE*

Amici are officials of 32 states and the District of Columbia who administer or enforce state laws regulating mortgage lenders and other providers of financial services. Throughout this nation's history, the states have played leading roles in promulgating and enforcing laws designed to protect consumers against abusive and unfair practices by financial service providers. In the decision below, the Sixth Circuit Court of Appeals upheld regulations issued by the Office of the Comptroller of the Currency ("OCC"), which vest the OCC with exclusive supervisory control over all state-chartered corporations that are operating subsidiaries of national banks. The OCC's regulations effectively bar the states from regulating an important category of state-chartered corporations for the purpose of preventing fraudulent or unscrupulous financial activities. The decision below is of great concern to *amici*, because it undermines federalism principles that are cornerstones of our systems of financial regulation and corporate governance. *Amici* therefore have a compelling interest in supporting the petition for writ of certiorari in this case.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Erred in Granting *Chevron* Deference to the OCC's Regulations.

A. The Sixth Circuit mistakenly applied a presumption in favor of the OCC's authority to adopt its preemptive rules.

The Sixth Circuit upheld regulations issued by the OCC, which declare that the OCC possesses exclusive authority to regulate state-chartered corporations that are operating subsidiaries of national banks.[1] The core of the

[1] Under the OCC's regulations, a subsidiary of a national bank qualifies as an "operating subsidiary" if (i) the subsidiary engages in "activities that are permissible for a national bank to engage in

(Continued on following page)

OCC's preemption claim is set forth in 12 C.F.R. § 7.4006. Section 7.4006 asserts that, unless otherwise provided by federal law, "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." When the OCC adopted § 7.4006, the agency claimed that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001); *see also* 69 Fed. Reg. 1895, 1900 (2004) (contending that operating subsidiaries are "in essence, no more than incorporated departments of the [parent] bank itself").

Operating in combination with two other OCC rules that apply to national banks, § 7.4006 divests the states of their authority to regulate the activities and corporate governance of all state-chartered operating subsidiaries. First, 12 C.F.R. § 7.4000(a) provides that "State officials may not exercise any visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."[2] Second, under 12 C.F.R. § 7.2000(a), every "corporate governance procedure" of a national bank must "comply with applicable Federal banking statutes and regulations." Federal banking laws and the OCC's rules dictate a wide range of corporate governance matters for national banks, including the appointment and dismissal of officers; provisions dealing with capital stock and dividends; shareholders' voting rights (including a requirement for cumulative voting in all elections of directors); numbers

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directly," and (ii) the parent bank "controls" the subsidiary. 12 C.F.R. § 5.34(e)(1), (2).

[2] The OCC issued 12 C.F.R. § 7.4000 in reliance on 12 U.S.C. § 484(a). Section 484(a) limits the exercise of "visitorial powers" **only** with respect to a "national bank" and does **not** refer to operating subsidiaries or other affiliates of a national bank. *See* Petition for Writ of Certiorari ("Pet. Cert.") 8-9, 12-15.

and qualifications of directors; required oaths for directors; and approvals of mergers and consolidations.[3] By their terms, 12 C.F.R. §§ 7.4000 and 7.2000 apply only to "national banks." However, § 7.4006 makes both rules applicable to state-chartered operating subsidiaries, thereby preempting the states' authority to regulate such corporations' business activities or to supervise their corporate governance.

The Sixth Circuit concluded that 12 C.F.R. §§ 7.4000 and 7.4006 preempted several Michigan statutes. Those state statutes require state-chartered, non-bank mortgage lenders to register with the Commissioner of the Michigan Office of Insurance and Financial Services (the "Commissioner"), to provide annual financial statements and to pay annual fees to the Commissioner, to maintain certain documents for review by the Commissioner, and to permit the Commissioner to conduct investigations of consumer complaints that are not being pursued by the OCC. In practical effect, the Sixth Circuit's decision divested the Commissioner of all authority to regulate state-chartered operating subsidiaries.[4]

In rejecting the Commissioner's challenge to the OCC's rules, the Sixth Circuit held that there was no need to decide "whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's." Pet. App. 6a-7a & n.3. The Sixth Circuit cited *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), where this Court held that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law" and that a state court's "narrow focus on Congress' intent to supersede state law

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[3] *See* 12 U.S.C. §§ 24(Fifth), 51a-61, 71-76, 215-215c; 12 C.F.R. §§ 5.33, 7.2000-7.2024.

[4] *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 2a & n.1, 3a-4a (describing Michigan laws preempted by the OCC's rules); Pet. Cert. 5-6 (same).

was misdirected." *Id.* at 154. Read in context, the foregoing statements indicate that a specific statement of Congress' preemptive intent is not required in the statutory text if the overall statutory scheme shows that Congress contemplated the adoption of agency rules displacing state law. This Court found in *de la Cuesta* that § 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1464(a), granted "plenary authority" to the Federal Home Loan Bank Board "to regulate the lending practices of federal savings and loans. . . . Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed the 'best practices' [of thrift institutions]." *Id.* at 160-61. This Court concluded that "the statutory language [of HOLA] suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 162.

Contrary to the Sixth Circuit's apparent view, *de la Cuesta* does not relieve a reviewing court of its duty to determine whether a federal agency's preemptive rule is consistent with congressional intent. In *de la Cuesta*, this Court carefully considered "whether the Board acted within its statutory authority in issuing the pre-emptive . . . regulation." *Id.* at 159. Similarly, in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), this Court declared that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369. Therefore, a reviewing court must invalidate any preemptive rule that exceeds the authority granted to the federal agency by Congress:

> [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether

> Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.[5]

The Sixth Circuit concluded that it was required to defer to the OCC's rules under "the framework established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." Pet. App. 7a. The Sixth Circuit interpreted *Chevron* as obliging it to "give great weight to any reasonable construction" of the national banking statutes by the OCC as long as those statutes were "silent or ambiguous." Pet. App. 8a (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987), and *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). However, the Sixth Circuit failed to recognize that neither *Clarke* nor *NationsBank* involved a federal agency regulation that purported to preempt state law. Instead, those cases dealt with the proper interpretation of federal statutes that placed limits on the permissible activities of national banks.

In basing its decision on *Chevron* deference, the Sixth Circuit agreed with prior decisions of the Second and Ninth Circuits, which also upheld the OCC's preemptive rules regarding state-chartered operating subsidiaries.[6] All three courts upheld the OCC's rules under *Chevron* because they found the national banking laws to be silent on the issue of whether the OCC possesses sole and exclusive supervisory control over operating subsidiaries. In the view of all three courts, the OCC enjoyed free rein to adopt

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[5] *Id.* at 374. *See also, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (declaring that "the purpose of Congress is the ultimate touchstone in every pre-emption case") (internal quotation marks and citation omitted).

[6] *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, No. 05-431 (U.S., Sept. 30, 2005); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005).

its preemptive regulations in the absence of a "manifest congressional intent" that would prohibit such rules.[7]

The application of *Chevron* by all three courts was fundamentally flawed. Their approach effectively created a presumption **favoring** the OCC's authority to issue regulations preempting state law – a presumption that could **not** be overcome without evidence that Congress had expressed an "unambiguous intent" to prohibit the OCC from adopting such rules. *See* Pet. App. 8a-10a. As a consequence, all three decisions conflict with this Court's well-established presumption **against** preemption of state law, as well as the proper limits of judicial deference under *Chevron* and its progeny.

B. The Sixth Circuit should have applied a presumption against preemption of the states' authority to regulate state-chartered, non-bank mortgage lenders.

The Sixth Circuit refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The Sixth Circuit held that this presumption was inapplicable because "[r]egulation of federally-chartered banks" is an area that has been "substantially occupied by federal authority for an extended period of time." Pet. App. 7a, n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). The Second and Ninth Circuits similarly refused to apply a presumption against preemption in

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[7] *See Burke*, 414 F.3d at 317-18 (finding "no manifest congressional intent to preclude the OCC regulations in this case" because "no [federal] statute speaks directly to the scope of federal versus state power over [operating subsidiaries]"); Pet. App. 9a-10a (quoting *Burke* and reaching same conclusion); *Boutris*, 419 F.3d at 961 & n.12 (stating that "the [National] Bank Act is silent" as to the OCC's authority to regulate operating subsidiaries and, therefore, Congress has not "unambiguously expressed [its] intent" to bar the OCC from issuing its preemptive rules) (internal quotation marks and citation omitted).

upholding the same OCC rules that are involved in this case.[8] The position of all three Circuits conflicts with at least two prior federal court decisions, which **did** apply a presumption against preemption in determining the applicability of state laws to national banks.[9]

The Second, Sixth and Ninth Circuits were clearly mistaken in view of this Court's decisions affirming the states' significant role in regulating national banks. In *Atherton v. FDIC*, 519 U.S. 213 (1997), this Court declared that "federally chartered banks are subject to state law." *Id.* at 222. As support for that principle, this Court cited decisions reaching back to an 1870 case, which held that national banks

> . . . are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).

Similarly, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), this Court held that states have "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with

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[8] *Burke*, 414 F.3d at 314; *Boutris*, 431 F.3d at 956.

[9] *National State Bank v. Long*, 630 F.2d 981, 985-87 (3d Cir. 1980); *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp.2d 1041, 1048-49 (S.D. Fla.), *aff'd*, 205 F.3d 1358 (11th Cir. 1998) (per curiam), *cert. denied*, 531 U.S. 822 (2000).

the national bank's exercise of its powers."[10] *Atherton* and *Barnett Bank* are consistent with the presumption against preemption that this Court has repeatedly applied in fields of traditional state regulation, including state legislation designed to protect consumers against abusive or unsafe practices in the sale of goods or services.[11]

In *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), this Court held that the presumption against preemption by federal law applies

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[10] *Id.* at 33. *See also, e.g., Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944) (holding that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (holding that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule", while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States").

[11] *E.g., Medtronic v. Lohr*, 518 U.S. at 475, 484-85; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-20 (1992); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-44, 146-47, 150 (1963). In refusing to apply a presumption against preemption of the state laws displaced by the OCC's regulations, the Second and Ninth Circuits mistakenly relied on *United States v. Locke*, 529 U.S. 89 (2000). *See Burke*, 414 F.3d at 314; *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002), cited in *Boutris*, 419 F.3d at 956. In *Locke*, this Court declined to apply a presumption against preemption in striking down state laws that imposed restrictions on oil tankers operating in navigable waterways. This Court emphasized that the challenged state laws sought to regulate "national and international maritime commerce", an area in which Congress had shown a strong desire to establish a "uniformity of regulation." *Id.* at 108. By contrast, in *Atherton*, after reviewing the long history of state regulation of national banks, the Supreme Court held that federal policy did **not** require any "uniformity" of regulatory treatment for federally-chartered banks. 519 U.S. at 219-26. Thus, *Locke* does **not** support the Sixth Circuit's refusal to apply a presumption against preemption in this case.

not only to federal statutes but also when "the field [of traditional state concern] is said to have been pre-empted by an agency, acting pursuant to congressional delegation." *Id.* at 715-16. In such a case, preemption will be found only if there is "a conflict between a particular [state law] and the federal scheme, that is strong enough to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation." *Id.* at 716.

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal Act"). In explaining why state laws should generally apply to national banks, the conference report on the Riegle-Neal Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.

H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

In addition to their refusal to recognize the states' important role in regulating national banks, the Second, Sixth and Ninth Circuits failed to appreciate the significance of the OCC's attempt to obliterate the legal distinction between national banks and their state-chartered operating subsidiaries. By disregarding the separate legal

status of operating subsidiaries, the OCC claimed power to override the states' authority to regulate thousands of state-chartered, non-bank corporations controlled by national banks. Yet this Court has repeatedly affirmed the authority of each state (i) to supervise comprehensively the corporations it charters, and (ii) to license and regulate companies chartered by other states that transact business within its borders. With regard to locally-chartered companies, this Court has declared:

> No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. . . .
>
> . . . .
>
> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89, 91 (1987).

With regard to foreign corporations, this Court has held that each state "is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Each state may therefore require foreign corporations to comply with licensing requirements and other regulations designed to "assur[e] responsibility and fair dealing." *Id.* at 210. *Jensen*'s confirmation of the states' authority to regulate foreign corporations is directly relevant to this case, because Respondent Wachovia Mortgage Corporation has obtained a certificate of authority to conduct business in Michigan as a foreign non-bank corporation. Pet. Cert. 5-6, 20-21.

This Court has consistently interpreted federal statutes in a manner that affirms the states' long-established authority to regulate state-chartered corporations, absent compelling evidence of congressional intent to the contrary.[12] In the field of financial services, this Court has recognized the states' strong interest in regulating both banks and non-bank financial institutions, because "sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

In addition to its affirmation of state control over state-chartered corporations, this Court has declared that the separate legal status of a subsidiary and its parent corporation is "[a] basic tenet of American corporate law." *Dole Food Corp. v. Patrickson*, 538 U.S. 468, 474 (2003); *accord, United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Accordingly, this Court has consistently applied a presumption that federal statutes embody the principle of corporate separation absent clear evidence that Congress intended a different result.[13]

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[12] *E.g., CTS Corp.*, 481 U.S. at 85, 86 (refusing to construe a federal statute to "pre-empt a variety of state corporate laws of hitherto unquestioned validity," because the "longstanding prevalence of state regulation in this area suggests that if Congress had intended to pre-empt all [such] state laws . . . it would have said so explicitly"); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly when established state policies of corporate regulation would be overridden").

[13] *E.g., Dole Food*, 538 U.S. at 475-76 (refusing to conclude that "all subsidiaries are deemed to be the same as the parent corporation," because "[t]he text of the [relevant statute] gives no indication that Congress intended us to depart from the general rules regarding corporate formalities"); *Bestfoods*, 524 U.S. at 62 (rejecting a proposed interpretation of a federal statute that would impose automatic liability on a parent corporation for the acts of its subsidiary, because "nothing

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Contrary to this Court's decisions upholding state corporate regulation and corporate separation, the OCC asserts that state-chartered operating subsidiaries are "indistinguishable" from their parent national bank and "in essence, no more than incorporated departments of the bank itself." 69 Fed. Reg. at 1900. These extraordinary claims reveal the dramatic conflict between the OCC's regulations and this Court's well-established presumptions in favor of state corporate regulation and the separate legal status of parent corporations and subsidiaries.

C. The Sixth Circuit's decision conflicts with a decision of the Tenth Circuit and fails to observe the limitations on judicial deference under the *Chevron* doctrine.

1. The Tenth Circuit correctly held that *Chevron* does not apply to preemptive rulings by federal agencies.

The *Chevron* doctrine should not be applied to federal agency rulings that claim to have preemptive effect. Whether a federal agency possesses statutory authority to issue a regulation that preempts state law is a legal question as to which the judicial branch has both superior expertise and an institutional responsibility to resolve sensitive issues regarding the allocation of federal and state power. As Justices Kennedy and O'Connor have observed, "the whole jurisprudence of pre-emption" is one of the important ways in which the judiciary "has participated in maintaining the federal balance" between national and state authority.[14]

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in [the statute] purports to reject this bedrock principle" of corporate separation).

[14] *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

This Court has never ruled definitively on the question of whether the *Chevron* doctrine applies to preemption determinations by federal agencies. In *Chevron* itself, the Supreme Court was not faced with any preemption issue and considered only the question of whether the federal agency's regulation represented a "reasonable construction" of the governing federal statute. 467 U.S. at 840. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that the presumption against preemption of state law "in effect trumps *Chevron*." *Id.* at 743. Therefore, the petitioner argued, a reviewing court may not defer to a federal agency's preemption determination, and the court instead must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, this Court assumed, without deciding, that the question of a statute's preemptive effect "must always be decided *de novo* by the courts."[15]

The Tenth Circuit decided the issue left unresolved in *Smiley*. The Tenth Circuit declared that a federal agency's preemption determination is **not** entitled to deference under *Chevron*, because such a determination "involves matters of law – an area more within the expertise of the courts than within the expertise of the [agency].". *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991). Thus, the Tenth Circuit's decision in *Harmon* squarely conflicts with the decisions of the Second, Sixth and Ninth Circuits, which granted *Chevron* deference to the OCC's preemptive regulation. To resolve this important conflict among the circuits, this Court should grant review in this case and also in *Burke*. In

[15] *Id.* at 743-44. Subsequently, in *Medtronic*, four members of this Court observed that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." *Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part).

addition, this Court should confirm that the presumption against preemption obliges the OCC to demonstrate that 12 C.F.R. § 7.4006 is consistent with "the clear and manifest purpose of Congress" – a burden that the OCC simply cannot meet.[16]

The OCC's self-interest in issuing preemptive rules provides a further compelling reason for rejecting the OCC's appeal for *Chevron* deference. Section 7.4006 is one of a long series of preemptive rules and opinions that the OCC has issued in recent years. In defending its preemptive rulings, the OCC has declared that preemption of state law is "a significant benefit of the national charter – a benefit that the OCC has fought hard over the years to preserve." The OCC's aggressive theory of preemption gives national banks a "major advantage" over state banks, because the OCC claims that national banks should be free "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[17]

The OCC has a powerful self-interest in persuading the largest banks to operate under national charters. Virtually all of the OCC's budget is funded by assessments paid by national banks, and the biggest national banks pay the highest assessments. In response to the OCC's aggressive preemption efforts, several large, multistate

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[16] *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). For evidence showing that 12 C.F.R. § 7.4006 is **not** consistent with the "clear and manifest purpose of Congress," *see* Pet. Cert. 8-9, 12-21, 26-30; Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking & Financial Law 225, 324-48, 357-63 (2004).

[17] Quotations in the preceding paragraph are from a speech by Comptroller of the Currency John D. Hawke, Jr. on Feb. 12, 2002, quoted in Wilmarth, *supra* note 16, at 236, 274.

banks have recently converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[18] Given the OCC's obvious financial and empire-building motives for issuing preemptive regulations, those rules should be disqualified from any consideration for *Chevron* deference.[19]

2. Even if *Chevron* applies to preemptive rules, 12 C.F.R. § 7.4006 is not entitled to deference.

Even if this Court determines that the *Chevron* doctrine may properly be applied in reviewing preemptive regulations, the Second, Sixth and Ninth Circuits plainly erred in granting deference to 12 C.F.R. § 7.4006. As explained above in Part I.A., the approach followed by all three courts would give the OCC an unlimited authority to issue regulations preempting state law **except** in areas where Congress has **affirmatively prohibited** such regulations by **unambiguous** statutory language. As shown by this Court's subsequent decision in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), all three courts failed to understand the prerequisites for *Chevron* deference.

In *Gonzales*, this Court explained that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative [agency] is involved." *Id.*

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[18] *See* Wilmarth, *supra* note 16, at 274-79, 289-93; Arthur E. Wilmarth, Jr., OCC v. Spitzer: *An Erroneous Application of* Chevron *That Should Be Reversed*, 86 BNA's Banking Report No. 8, Feb. 20, 2006, at 379, 387.

[19] *See* Wilmarth, *supra* note 16, at 232-33, 293-98; *see also* Timothy K. Amstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell Journal of Law & Public Policy 203, 208-23, 234-45, 261-73, 282-87 (2004); Cass R. Sunstein, *Chevron Step Zero*, 92 Virginia Law Review 187, 209-10 (2006) (agreeing that, under "Chevron Step Zero," *Chevron* should **not** apply "when an agency's self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power").

at 916. Even if a statute is ambiguous, deference is appropriate under *Chevron* only if the federal agency's regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.* Moreover, a reviewing court may properly refuse to defer to an agency's claim of "broad and unusual authority through an implicit delegation" based on "vague terms or ancillary provisions" in the governing statute. *Id.* at 921 (internal quotation marks and citation omitted). In such a case, the reviewing court may appropriately conclude that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2001)).

Thus, *Gonzales* makes clear that statutory silence or ambiguity is **not** a sufficient basis for granting deference to a federal agency's regulation under *Chevron*. Instead, a reviewing court must first carefully consider – as a precondition for applying *Chevron*'s two-step analysis – whether Congress has expressly or impliedly authorized the agency to adopt a regulation to clarify the ambiguity or to fill the "gap" that the agency has identified in the governing statute. Only if the court answers "yes" to this essential question may the court then apply *Chevron*'s two-step analysis to determine whether the agency's interpretation of the statute is entitled to deference.[20] *Gonzales* also cautions that when an agency issues a ruling that significantly expands its jurisdiction or encroaches upon an area traditionally regulated by the states, the reviewing court should be highly skeptical of

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[20] *See Gonzales*, 126 S. Ct. at 916-22, 925; *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining that deference under *Chevron* is proper only when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

the agency's claim of implied authority unless the agency can show that its ruling is consistent with clear evidence of congressional intent.[21]

In *Gonzales*, this Court struck down an interpretive rule issued by the United States Attorney General. Under that rule, physicians prescribing controlled substances for assisted suicides were deemed to be engaged in an illegitimate medical practice and were subject to civil and criminal sanctions, notwithstanding their compliance with the law of the state in which they were licensed to practice. This Court determined that the federal Controlled Substances Act ("CSA") "manifests no intent to regulate the practice of medicine generally" and, instead, indicated a congressional purpose to "rely upon a functioning medical profession regulated under the States' police powers." 126 S. Ct. at 923. Accordingly, this Court invalidated the rule because (i) the Attorney General's claim of authority would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality", and (ii) the "text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." *Id.* at 925.

The District of Columbia Circuit followed a similar approach in refusing to give *Chevron* deference to a ruling by the Federal Trade Commission ("FTC"). *Am. Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). The FTC's ruling purported to classify attorneys as "financial institutions" for purposes of a federal banking statute that requires financial institutions to protect the privacy of their customers. The FTC's ruling would have enabled the agency to "extend its regulatory authority over attorneys engaged in the practice of law", even though "the regulation of the practice of law is traditionally the province of the states." *Id.* at 468, 471. In concluding that the FTC's ruling was

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[21] *See Gonzales*, 126 S. Ct. at 918, 921-22, 924-25.

not entitled to *Chevron* deference, the court held that "Congress has not made an intention to regulate the practice of law 'unmistakably clear' in the language of the [federal statute]", and "it is not reasonable for an agency to conclude that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous."[22]

The court also rejected the FTC's suggestion that a federal agency should be entitled to a highly deferential review under "step two" of *Chevron* in any case where the "[federal] statute does not expressly **negate** the existence of a claimed administrative power." The court declared that such an application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to **presume** a delegation of power from the absence of an express **withholding** of such power, agencies would enjoy virtually limitless hegemony."[23]

Like the agency rulings in *Gonzales* and *ABA v. FTC*, 12 C.F.R. § 7.4006 represents a radical extension of federal agency authority into an area traditionally regulated by the states. As shown above, § 7.4006 ignores the legal separation between national banks and their state-chartered operating subsidiaries, and it preempts all state authority to regulate such subsidiaries. Yet the federal banking statutes do not manifest any clear indication of congressional intent to vest the OCC with exclusive authority over **state-chartered, non-bank corporations** that are controlled by national banks. In fact, those statutes define the term "national bank" to include **only federally-chartered depository institutions** that are eligible to become members of the Federal Reserve System and to receive federal deposit insurance. *See* 12 U.S.C.

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[22] *Id.* at 472, 473 (citations omitted).

[23] *Id.* at 468 (for both quotations, emphasis appears in the original, and internal quotation marks and citation are omitted).

§§ 21-24, 26-27, 221a(a), 282, 1813(a)(1), (c)(2) & (4), 1814-16. Thus, as Petitioner has shown, § 7.4006 is indefensible under either "step one" or "step two" of *Chevron*. *See* Pet. Cert. 8-21. In *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), this Court struck down a similar regulation of the Federal Reserve Board, which attempted to redefine the term "bank" for purposes of the Bank Holding Company Act. This Court held that the "traditional deference courts pay to agency interpretation" did **not** allow the Board to expand the limits of its jurisdiction beyond the boundaries established by the "plain language of the statute." *Id.* at 368, 373-74. Section 7.4006 should be invalidated for the same reason.

II. The OCC's Rules Violate the Tenth Amendment by Infringing on the States' sovereign Authority to Regulate State-Chartered Corporations.

As shown above in Part I.A., 12 C.F.R. § 7.4006 bars the states from regulating state-chartered operating subsidiaries or from establishing any corporate governance rules for such subsidiaries that are inconsistent with the extensive federal rules governing national banks. Thus, the OCC's rule effectively "federalizes" state-chartered operating subsidiaries by placing them under the OCC's exclusive supervisory control. However, this Court has held that the federal government intrudes upon the states' sovereign authority and exceeds the boundaries established by the Tenth Amendment when it attempts to "convert [state-chartered corporations] into creatures of the federal government" without the permission of the chartering states. *Hopkins Federal Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335 (1935). *See* Pet. Cert. 26-30. In an analogous case, this Court refused to give *Chevron* deference to a federal agency's interpretive rule, because the rule adopted an expansive definition of the agency's jurisdiction that created "significant constitutional and federalism questions." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S.

159, 174 (2001). This Court invalidated the rule, holding that it "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power" without any "clear indication that Congress intended that result." *Id.* at 172-73. Based on the same canon in favor of avoiding serious constitutional questions, § 7.4006 should be denied any deference under *Chevron*, because the rule infringes upon the states' sovereign powers to regulate the activities and governance of state-chartered corporations without any clear evidence of supporting congressional intent.

CONCLUSION

The petition for writ of certiorari should be granted.

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